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JAMES H. McKENNEY,
Clerk.

No. 391.

Add'l. Brf. of Pflaum, Ach & Levinson

For Appts.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed Jan 39 18, 1901.

In the matter of **AUGUST FRANK, JOSEPH FRANK and LOUIS FRANK, trading as FRANK BROS., Bankrupts.**

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, COPARTNERS AS CARSON, PIRIE, SCOTT & COMPANY,

Appellants,

vs.

THE CHICAGO TITLE & TRUST COMPANY,

Appellee.

ADDITIONAL BRIEF AND ARGUMENT FOR APPELLANTS.

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MR. HENRY ACH,
MR. GEORGE PACKARD,
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BARNARD & MILLER PRINT, CHICAGO.

30402

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JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, COPARTNERS, AS CARSON, PIRIE SCOTT & CO., *Appellants,*

vs.

THE CHICAGO TITLE & TRUST CO., *Appellee.*

Additional Brief and Argument for Appellants.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Without receding in any way from the position taken in our original brief, but in order that this court may fully consider the questions involved, we invite the court's attention to the following proposition:

If this court does not hold (as we contend it should), that only a creditor who received a preference with reasonable cause to believe that it was intended as such, must surrender his claim before sharing in the dividends of the estate, then we submit, that to constitute a preference under the Bankruptcy Act, within either 57 G or 60 A, at least *the intent on the part of the bankrupt to prefer must be present.*

We think an examination and comparison of the pertinent sections of the present act make this proposition self-evident. Section 3, defines and enumerates acts of bankruptcy. The allegations in a petition asserting acts of bankruptcy must come within the express terms of Section 3, to give the court jurisdiction. Clause (2) of Section 3 A defines the only act of bankruptcy under which payments of money in the regular course of business, as in the case at bar, can possibly be included. For the court's convenience we reprint the sections here under discussion. Section 3 A provides:

> "Acts of bankruptcy by a person shall consist of his having * * * (2) transferred while insolvent, any portion of his property to one or more of his creditors with *intent to prefer* such creditors over his other creditors."

Sec. 3 B provides:

> "A petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy, within four months after the commission of such act."

Sec. 60 A provides:

> "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against him in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The provisions of 60A, differ by omission from the requirements of an "act of bankruptcy," under Sec. 3 in two ways:

1st. Sec. 60A does not speak of the intent on the part of the debtor to prefer his creditor, as Sec. 3A (2) does; and,

2d. No time limit of four months is provided in Section 60 A as in Section 3 B.

It is manifest that Congress, in defining preferences and acts of bankruptcy, intended that a preference against which it was legislating, if committed, would constitute an act of bankruptcy. For a preference by a debtor that does not constitute an act of bankruptcy, is a misnomer and an absurdity. And a preference by a debtor without the element of intention is no more possible than thought without mind, or matter without space.

In order to reach the conclusion that 60A should be construed alone, and that it contains in itself a satisfactory definition of a preference, Congress must be supposed to have abolished the original and fixed meaning of the word "preference," and to have declared that a new definition hitherto unknown to the lexicons and the common law, was thereby created.

Furthermore, the same reasoning would compel us to assume that Congress intended that there could be preferences under the act which were not acts of bankruptcy; that preferences could be committed by an insolvent debtor which come within the letter of Sec. 60A, but within neither the letter nor the spirit of a proclaimed act of bankruptcy under Sec. 3. Does it not strike the mind as almost absurd that Congress should have wasted its time defining an *unpreferential preference,* the commission of which is no act of bankruptcy, and of which a court of bankruptcy could not take jurisdiction or cognizance? This is the necessary conclusion to be drawn

from the eviscerated meaning of the word "preference" contended for by appellee in construing Sec. 60A. But such construction is, we submit, unsound. Suppose a petition had been filed below against Frank Bros., setting up the commission of alleged preferences literally as defined in 60A; a demurrer would have been sustained and the petition dismissed because the petition would allege no act of bankruptcy as defined by Sec. 3. So that if this court reaches the conclusion that Congress intended to eliminate the element of intent from the word "preference," then it inevitably follows that preferences can be committed which are not acts of bankruptcy, but which are defined by Congress merely as an arbitrary exercise of philologic power.

This court held under the Bankruptcy Law of 1867 that

If the debtor did not intend to give a preference and the creditor did not have reasonable cause to believe the debtor to be insolvent, the transfer is valid, although the debtor was then insolvent.

Mays v. *Fritton,* 20 Wall., 414, at p. 420.

Under the Act of 1867, the decisions were that intent means an actual design in the mind, and must be proven as a question of fact.

In re Drummond, 1 B. R., 231.
In re Cowles, 1 B. R., 280.
Perry v. *Langley,* 2 B. R., 596.
In re Goldschmidt, 3 B. R., 165.

Also, that the intent need exist only on the part of the person making the transfer. If that exists, the debtor clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor or the person to whom the transfer is made.

In re Drummond, 1 B. R., 231.

That Congress included the element of intent in defining preferences under 60A is clear. Sec. 60A defines what is a preference (with the two elements necessarily imported from Sec. 3), from the point of view of the bankrupt. 60B says that where a bankrupt shall have given a preference within four months, and the person receiving it, "shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee," etc.

Now, if under Sec. 60A, a bankrupt may give a preference without the "intent to prefer" how can a creditor ever have knowledge or "reasonable cause to believe" that something existed which does not exist, namely: the intent to prefer? Thus in the case at bar, there having been no intention by the bankrupts to prefer appellants, how could appellants have had knowledge of such intention? It is clear, therefore, from 60B that the "intention to prefer" was not eliminated from preferences under 60A, but expressly recognized as an inherent attribute of the word. Congress was thus intending to give preference its settled meaning; and Sec. 60B follows logically, providing a method of recovery in all cases where the intent, which necessarily must exist in the mind of the bankrupt, is known to the creditor receiving the preference. For otherwise Sec. 60B would have provided that two things *not mentioned in 60A* must concur: 1st. The intent on the part of the bankrupt to prefer; and second, Knowledge on the part of the creditor of such intent. This is not done, because it is presumed in 60A that a preference necessarily involves the intent to prefer on the part of the debtor.

We submit that this court ought not to hold that a creditor has received a preference, unless at least the

debtor intended it as a preference. To hold otherwise would not only distort the ordinary import of an English word, but make the bankrupt act itself harmful to the very persons whom the legislation against preferences was designed to protect and benefit, namely: the creditor class. There is not a merchant in this land who is not opposed to this construction and its unjust consequences. It cannot be denied that the sections against preferences were enacted to benefit creditors, but the construction contended for by appellee works hardships and incongruities, and is reprobated by the entire creditor class. Such a construction is repugnant to the very purpose of the enactment.

*
* *

The Bankruptcy Act of 1867 and the present act are, when their various provisions are gathered together, substantially the same with regard to preferences.

Section 5021 of the Act of 1867 (Bump on Bankruptcy, p. 387) provides that

> "Any person residing and owing debts as aforesaid, who after the passage of this act, etc., * * * or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, *with intent to give a preference to one or more of his creditors* * * * shall be deemed to have committed an act of bankruptcy," etc.

And further on in the same paragraph (Bump on Bank., p. 388), it is said:

> "And if such person shall be adjudged a bankrupt, the assignee may recover back the money or prop-

erty so paid, conveyed, sold, assigned or transferred contrary to this act, providing that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent and knew that a fraud on this act was intended," etc.

Section 5084 of the act of 1867 (Bump on B., p. 628), provides that:

> "A person who * * * accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any of the provisions of this act, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference."

If, in construing section 5084 of the Act of 1867, we omit the words "having reasonable cause," etc., we still have remaining the word "preference" and its original and familiar meaning. The omission of the clause "having reasonable cause," etc., does not eliminate the necessity of the intent on the part of the debtor to prefer. So that, unless Congress in the present act intended to deprive the word "preference" of its fixed meaning, the same necessity exists under 60A and 57G of the present act to prove that the payment or transfer was intended by the debtor as a preference, as under the act of 1867. In short, the act of 1867 and the present act, as regards preferences, alike involve the intent of the bankrupt.

Section 5128 of the Act of 1867 (Bump on B., p. 791), provides that:

> "If any person being insolvent * * * within four months before the filing of the petition by, or against him, with a view to give a preference to any creditor, * * * makes any payment, pledge, assignment, transfer or conveyance of any part of his

> property, * * * the person receiving such payment, etc., or to be benefited thereby, * * * having reasonable cause to believe such person is insolvent, and knowing that such * * * payment * * * is made in fraud of the provisions of this title, the same shall be void and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

It is to be noted that neither Section 5021, defining acts of bankruptcy, and providing remedies, nor Section 5084, requiring surrenders by preferred creditors before filing claims, contain any time limit, but that the time limit of four months is provided in Section 5128. Under the Act of 1867, these three sections were construed *in pari materia*, and the four months' limitation provided in Section 5128 was imported into the other sections, just as in the case at bar, we show that the four months' limitation must be imported into Section 60A.

We respectfully ask this court to give to the word preference its usual meaning and construction.

Respectfully submitted.

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